MOHAMED AZMAL NOOR NAINA MOHD NOOR *a*

v.

ARAB-MALAYSIAN FINANCE BHD & ANOR

COURT APPEAL, KUALA LUMPUR *b*
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: P-02-317-1997]
18 APRIL 2003 *c*

LAND LAW: *Sale of land - Auction - Application to extend time to settle purchase price - Whether in contravention of sales conditions - Whether reasons provided - Whether application has locus standi to forward application*

The appellant had assigned his rights in an apartment to the respondent as security for moneys lent to him. Upon the appellant's failure to meet his repayments for the said loan, the respondent sought for and obtained an order for sale ('the main action') of the said apartment which was eventually sold to the purchaser through a public auction. Paragraph 12 of the sales conditions required the purchaser to settle in full the purchase price within 90 days from the date of the auction. Having paid the deposit, the purchaser however failed to meet this stipulation and applied to the senior assistant registrar for an extension of time *vide* encl 37. However, at the date of hearing, neither the purchaser nor counsel showed up as they were unaware of the said date and the application was struck off. Subsequently, upon the SAR's direction, the purchaser applied for the second time *vide* encl. 40 for the same and the SAR granted the extension after hearing the matter. Dissatisfied, the appellant appealed to this court against the said extension. The appellant's objection was premised on three grounds, namely: i) that the application ought to be disqualified as it contravened para. 12 of the sales conditions; ii) that the purchaser had not explained the reason for the extension; and iii) that the purchaser had no *locus standi* to apply for the extension as she was not a party to the main action.

d *e* *f* *g*

Held:
Per Abdul Aziz Mohamad JCA

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[1] Based on the circumstances, it was not anybody's fault that encl. 37, which had been filed in time, was struck out. As such, encl. 40 was viewed as a substitute for encl. 37 and as standing in the place of the said enclosure

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which in effect could be considered as if encl. 37 was reinstated. Thus, the resurrection of the application for extension in the form of encl. 40 could not be said to have been filed out of time. (p 512 e & h)

[2] The purchaser had amply justified the reason for the extension as evidenced from her affidavits. (p 510 g)

[3] The appellant's contention on the issue of *locus standi* must fail. The purchaser came in, in her own right, by virtue of para. 12 of the sales conditions. The said paragraph conferred upon her the right to apply for an extension of time for paying the purchase price. An application by her to be added as a party to the main action would have been contrary to the purpose of a joinder provided for under O. 15 r. 6(2)(b) of the Rules of the High Court 1980. (p 511 f-g)

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah menyerahhak hak-hak ke atas sebuah rumah pangsa kepada responden sebagai sekuriti untuk sejumlah wang yang dipinjam kepadanya. Atas kegagalan perayu membuat pembayaran-balik untuk pinjaman tersebut, responden telah memohon dan mendapatkan perintah jual ('tindakan utama') terhadap rumah pangsa tersebut yang kemudiannya telah dijual kepada pembeli melalui suatu lelongan awam. Perenggan 12 syarat-syarat pembelian mengkehendaki pembeli menyelesaikan harga pembelian dengan penuh dalam masa 90 hari daripada tarikh lelongan awam. Setelah membayar deposit berkenaan, pembeli sebaliknya gagal menyempurnakan stipulasi tersebut dan telah membuat permohonan kepada penolong kanan pendaftar ('PKP') untuk pelanjutan masa melalui lampiran 37. Akan tetapi, pada tarikh pembicaraan permohonan tersebut, pembeli mahupun peguamnya gagal menghadirkan diri kerana mereka tidak sedar akan tarikh tersebut dan permohonan itu dibatalkan. Sejurus kemudian, di atas arahan PKP, pembeli telah memohon pada kali keduanya melalui lampiran 40 untuk tujuan yang sama dan PKP telah membenarkan pelanjutan masa setelah membicarakannya. Tidak berpuas hati, perayu membuat rayuan ke mahkamah ini terhadap pelanjutan tersebut. Bantahan perayu adalah seperti berikut, iaitu i) permohonan pembeli seharusnya tidak dibenarkan kerana ia bertentangan dengan perenggan 12 syarat-syarat pembelian; ii) pembeli gagal memberi apa-apa penjelasan mengenai permohonan pelanjutannya; dan iii) pembeli tidak mempunyai *locus standi* untuk memohon pelanjutan masa kerana dia bukan seorang pihak dalam tindakan utama.

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Berdasarkan keadaan semasa, sememangnya tiada pihak yang boleh dipersalahkan atas pembatalan lampiran 37, yang telah difailkan dalam tempoh yang ditetapkan. Oleh itu, lampiran 40 dianggap sebagai pengganti kepada lampiran 37 dan berada di tempat lampiran berkenaan yang mana lampiran 37 boleh dianggapkan sebagai dihidupkan semula. Maka dengan itu, penghidupan semula permohonan untuk pelanjutan masa dalam bentuk lampiran 40 tidak boleh dianggapkan sebagai suatu yang telah difailkan di luar tempoh masa yang ditetapkan.

[2] Pembeli telah memberi penjelasan yang wajar berkenaan dengan pelanjutan masa sepertimana yang terkandung dalam afidavitnya.

[3] Hujah perayu berkenaan isu *locus standi* tidak terpakai. Penglibatan pembeli dalam hal ini adalah berpandukan haknya sendiri seperti yang diperuntukkan oleh perenggan 12 syarat-syarat pembelian. Perenggan tersebut memberikan kepadanya hak untuk membuat permohonan untuk pelanjutan masa untuk membayar harga pembelian. Jika beliau memohon untuk dicantumkan sebagai pihak kepada tindakan utama, ini akan bertentangan dengan tujuan percantuman seperti yang diperuntukkan oleh A. 15 k. 6(2)(b) Kaedah-kaedah Mahkamah Tinggi 1980

Rayuan ditolak dengan kos.]

Case(s) referred to:
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1990] 1 MLJ 317 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the appellant - Surinder Singh Gill; M/s Ong & Manecksha
For the respondents - Regina Daniel; M/s Cheong Wai Meng & Van Buerle

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-273-1994]

Reported by M Maheswaran

JUDGMENT

Abdul Aziz Mohamad JCA:
This appeal concerns an extension of time to pay the balance of purchase price, granted by the senior assistant registrar to the purchaser (the respondent applicant in this appeal) of the appellant's apartment at a public auction carried out at the instance of the respondents to recover moneys lent to the appellant

on the security of the apartment. The appellant's appeal to the judge in chambers against the grant of the extension of time was dismissed and the appellant now further appeals to this court.

The respondents obtained the order for sale of the apartment on 19 April 1994 on their application by originating summons ("the main action"). The public auction at which the purchaser was the successful bidder was held on 18 December 1996. The price was RM287,000, of which the purchaser paid RM28,700 (10%) on that day, leaving a balance of RM258,300. Paragraph 12 of the Syarat-syarat Jualan Lelong ("the sale conditions") provided as follows:

> Baki harga pembelian hendaklah dibayar oleh pembeli dengan bank deraf dalam tempoh sembilan puluh (90) hari dari tarikh jualan lelong kepada Mahkamah Tinggi Pulau Pinang **ataupun tempoh sembilan puluh (90) hari dari tarikh kebenaran diberi oleh pihak Berkuasa Negeri untuk memindahmilik harta berkenaan (sekiranya perlu)**. Walau bagaimanapun, jangka masa sembilan puluh (90) hari tersebut boleh dipanjangkan oleh Penolong Kanan Pendaftar atas permohonan pembeli sebelum tamat tempohnya dan sekiranya diterima alasan yang diberi untuk memanjangkan tempoh tersebut. Permohonan ini hendaklah dibuat secara Saman Dalam Kamar.

(The emphasis relating to the consent of the State Authority is original).

According to that paragraph, the purchaser had to pay the balance of RM258,300 within 90 days from the date of the auction. The period could, however, be extended by the senior assistant registrar provided that the purchaser made the application before the period expired. It is common ground that the period expired on 18 March 1997. (The period highlighted by the emphasis is not relevant because no question has arisen that the consent of the State Authority was required for a transfer).

On 12 March 1997, before the expiry of the period, the purchaser filed in the main action an application by summons-in-chambers for extension of time. In support of her application, the purchaser explained by affidavit that on 4 February 1997 the Hong Leong Bank had approved a loan of RM240,000 for the purchaser to purchase the apartment but it would take some time before the loan could be released because certain documents that Hong Leong Bank required the respondents to furnish before the loan could be released had not yet been furnished. One of the documents was the consent of the developers to the sale and assignment of the apartment by the respondents to the purchaser. The purchaser exhibited a letter dated 28 February 1997 from Hong Leong Bank's solicitors to the respondents' solicitors requesting for those documents. According to the letter, another document, besides others, that was required was the respondents' letter of undertaking to do two things, one of which was

to refund the loan in the event that the deed of assignment between the respondents and the purchaser could not be perfected. Although nothing has arisen about it, I think that it is appropriate to say, for the sake of completeness, that it seems to me from the mention of the developers' consent and of an assignment from the respondents to the purchaser that there was yet no separate title to the apartment, that the legal owner of the apartment was still the developers as legal owner of the entire land of which the apartment was yet an unsubdivided part, and that the security for the loan given by the respondents was in the form of an assignment of the appellant's rights in respect of the apartment to the respondents and not in the form of a charge under the National Land Code.

Advance copies of the purchaser's summons-in-chambers and supporting affidavit were served on the respective solicitors for the appellant and the respondents on 12 March 1997 itself. The application, when sealed, became encl. 37 and was given 21 March 1997 as the date of hearing. At the date of hearing the application was struck out because no one appeared for the purchaser and that was because her solicitors did not know of the date of hearing. They only knew of the date on 25 March 1997 when they received the sealed copies of the application. The appellant and respondents would also have been absent on 21 March 1997 because they too would not have known of the date since a sealed copy of the application bearing the date of hearing would not have been served on them by the purchaser's solicitors before that date.

After the purchaser's solicitors received the sealed copy of the application, one of them went on 31 March 1997 to see the senior assistant registrar, who informed the solicitor that the application had been struck out on 21 March 1997. Upon hearing the solicitor's explanation of the reason for the absence of the purchaser's counsel on 21 March, the senior assistant registrar directed the solicitor to file another summons-in-chambers. Accordingly, on the same date, 31 March 1997, but after the ninety days set by para. 12 of the sale conditions, another application similar to encl. 37 was filed seeking extension of time of three months after receipt by the purchaser of the developers' consent to the sale to the purchaser. The second application was duly sealed to become encl. 40, was served on the appellant and the respondents, and was heard on 5 April 1997 by the senior assistant registrar, who allowed an extension of two months from 18 March 1997 but ordered the purchaser to pay to the respondents interest on the balance purchase price from that date until settlement and to pay costs to the appellant and the respondents.

Before the senior assistant registrar, no objection was taken by the appellant that the application at encl. 40 was made after the period of ninety days prescribed by para. 12 of the sale conditions. Therefore the fact and fate of encl. 37 did not at that time come into the open. It is interesting to note that in the appeal before the judge in chambers, where the question was raised, the appellant's counsel is on record as saying that it was not raised before the senior assistant registrar because the appellant's counsel was not aware that it was encl. 40 that was being heard. Taking the answer to be true, I would assume that the appellant's counsel thought that the application that was being heard was encl. 37, which had been filed within time and of which the appellant's solicitors had received an unsealed copy.

Because that was the first time that the question was raised, the purchaser – the appellant's counsel not objecting – obtained the judge's leave to file an affidavit to set out the facts and fate of the previous application at encl. 37 that I have already set out.

In response to the disclosures made by the affidavit, the appellant's counsel submitted before the judge that the right procedural step would have been for the purchaser to apply to reinstate encl. 37.

The judge dismissed the appeal on 12 May 1997.

We learn from the written outlines of submission of the purchaser and the respondents and from the oral submission of the purchaser's counsel that by 16 May 1997, within the extended period, the balance of the purchase price and the interest on it on account of the extension had been paid into court, that on 26 September 2000 the respondents' solicitors, out of the total sum paid into court, were paid the amount due to the respondents and the appellant's solicitors were paid the remainder, and that the apartment has already been disposed off by the purchaser to another party.

In his oral submission before us, the appellant's counsel raised three issues.

As to one of the issues, it was said that the purchaser did not explain the need for her application for extension. That is not true. The need for the extension was as explained in her affidavit and as I have set out. It was a reasonable explanation.

As to another issue, it was submitted that the purchaser had no *locus standi* to apply for extension because she had not been made a party in the main action (which, as I said, was begun by originating summons). Order 15 r. 6 of the Rules of the High Court 1980 was cited in support of the submission. Paragraph 2(b) of O. 15 r. 6, as far as material, provides as follows:

(2) At any stage of the proceedings in any cause or matter the Court may ... on application (b) order any of the following persons to be added as a party, namely:

(i) any person who ought to be joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter ... .

It is clear to me from a reading of those provisions that the purpose of adding a party to a cause or matter is to contribute to the effective, complete, and global disposal or determination of the dispute in the cause or matter or of the relief or remedy that is claimed in it. In the main action the dispute was between the respondents and the appellant. The respondents sought an order for sale of the security to recover a debt due from the appellant. The purchaser was a complete stranger to the dispute, which was determined when the order for sale was granted. The purchaser came into the picture only after the dispute was determined and only as a purchaser, and she was still a stranger to the dispute that had already been determined. An application by her to be added as a party to the dispute would have been contrary to the purpose of the joinder that is provided for by para. (2)(b) of O. 15 r. 6. The purchaser came in in her own right by virtue of para. 12 of the sale conditions. She was given by that paragraph the right to apply for extension of the time for paying the purchase price. She could have originated proceedings to seek the extension but for the fact that para. 12 required her application to be by summons-in-chambers, which could not be used to commence proceedings. The course open to her was to apply by summons-in-chambers in the main action, but, as I said earlier, she could not properly have applied to be joined as a party under para. (2)(b) of O. 15 r. 6. To my mind the appeal on the ground of *locus standi* must fail.

The main issue raised in oral submission before us is the question of compliance with para. 12 of the sale conditions. The argument is that since the application for extension of time made by encl. 40 was made after the time allowed by para. 12, the application was disqualified and the senior assistant registrar had no jurisdiction to entertain it.

The learned judge, considering the circumstances, had been sympathetic with the purchaser. This was what he said at pp. 5 and 6 of his judgment:

> ... the Defendant "that is the appellant here" did not challenge nor controvert at all the explanation given for the delay in filing enclosure 40. And that explanation, in the considered opinion of the court, is both reasonable and deserving of the sympathy of the court and is more than sufficient to satisfactorily explain the Applicant's "that is the purchaser's" delay in making the said application, especially so as that explanation was not challenged or controverted. Reasonably, it would be harsh and severe, indeed, in view of the circumstances related by the Applicant, to accept the submission that there was a failure to comply with the conditions of sale. For there was an application (enclosure 37) within time. Unfortunately, that enclosure 37 was struck out, not on merits but, by default that Applicant or counsel had not contributed and should not therefore be faulted or penalized. Given furthermore that enclosure 40 was filed as directed by the learned Senior Assistant Registrar, it could not just be fairly said that enclosure 40 was truly filed out of time.

The judge took the view that, in the circumstances, encl. 40 could not be fairly said to be filed out of time.

I am in general agreement with the judge. It was not anybody's fault that encl. 37, which had been filed in time, was struck out. If at all there was a fault in this case it was only in the senior assistant registrar's directing the purchaser's solicitor to file another application instead of advising him to apply for reinstatement of encl. 37, and in the solicitor's complying with the direction. Maybe the senior assistant registrar did not know about the remedy of reinstatement or maybe he knew but considered that it would be neater to have another application filed, not realizing the technical risk that such a course would involve in respect of compliance with para. 12. Certainly filing another application would involve less work than applying for reinstatement because in the latter case there would be two applications to be heard, the application for reinstatement, and also, if it succeeded, encl. 37, whereas in the former case there would be only one application to be disposed of, encl. 40. If reinstatement had been applied for I can see no reason in the circumstances why, even if the application was opposed, reinstatement would not have been ordered. The result of either course would have been the same in that there would have been an application for extension of time to be dealt with. In the circumstances, I would view encl. 40 as a substitute for encl. 37 and as standing in place of encl. 37, and therefore as an application that was as good as if encl. 37 had been reinstated. The application for extension of time which was resurrected in encl. 40 cannot, therefore, be truly said, for the purposes of para. 12, to have been filed out of time.

There is another way of looking at the problem. In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase agreement between the respondents and the purchaser. It is a fact that the purchaser filed encl. 40 13 days after the expiry of the period prescribed by para. 12, but the respondents, the other party to the contract, did not object to the application for extension, thus waiving the contractual requirement as to the time within which to apply for extension. While the appellant had an interest in a strict observance of the terms of the contract – since, for example, if the extension was not allowed, then, under para. 13 of the sale conditions, should the purchaser fail to pay the balance within the prescribed period, the deposit shall be forfeited to the respondents to reduce the appellant's debt – I do not think, looking back now at the circumstances, that it was improper for the respondents to waive the requirement of para. 12. Strict compliance with para. 12 being properly waived by the rightful contracting party, the order of the senior assistant registrar cannot be said to have been made without jurisdiction by reason of the application for extension being filed out of time.

For those reasons I would dismiss this appeal with costs.

My learned brothers, Mokhtar Sidin and Mohd. Saari JJCA, have had an opportunity of reading this judgment in draft and have expressed their concurrence with it.